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September 5, 2018

Via ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) to Accelerate Investment in Broadband and Next-Generation Networks*, WC Docket No. 18-141

Dear Ms. Dortch:

Attached is the Redacted version of the Reply Comments of Verizon in the above-captioned matter. Verizon is filing the Highly Confidential version of these Reply Comments under separate cover.

Thank you for your assistance in this matter. Please contact me at 202-326-7930 or eleo@kellogghansen.com if you have any questions.

Sincerely,

Evan T. Leo

Attachment

REDACTED – FOR PUBLIC INSPECTION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of USTelecom for Forbearance	)	WC Docket No. 18-141
Pursuant to 47 U.S.C. § 160(c) to	)	
Accelerate Investment in Broadband and	)	
Next-Generation Networks	)	

REPLY COMMENTS OF VERIZON

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September 5, 2018

REDACTED – FOR PUBLIC INSPECTION

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INTRODUCTION AND SUMMARY[1]

The Commission should grant the Petition of USTelecom—The Broadband Association[2] to forbear from the unbundling, resale, and long-distance provisions of the Telecommunications Act of 1996 ("1996 Act" or "Act").[3] The record demonstrates that the telecommunications industry's radical transformation over the last two-plus decades has rendered these regulations unnecessary. Facilities-based competition is robust in the areas where demand for business data services is concentrated, and the Act's facilities-sharing provisions are today more likely to impede the continued growth of this competition than they are to facilitate it. In the voice marketplace, facilities-based wireless and broadband have usurped traditional wireline voice as the primary means of communications, and competition for these services is intense *despite* the Act's facilities-sharing provisions. Thus, consistent with the Commission's objective to "reliev[e] carriers from having to focus resources on complying with outdated legacy regulations that were based on technological and market conditions that differ from today,"[4] it should forbear from enforcing these anachronistic provisions.

Several companies that continue to purchase unbundled network elements ("UNEs") and discounted resale predictably argue that there are still discrete pockets of the country in which

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[1] The Verizon companies participating in this filing are the regulated, wholly owned subsidiaries of Verizon Communications Inc.

[2] Petition for Forbearance of USTelecom—The Broadband Association, *Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) to Accelerate Investment in Broadband and Next-Generation Networks*, WC Docket No. 18-141 (FCC filed May 4, 2018) ("Petition" or "USTelecom's Petition").

[3] Pub. L. No. 104-104, 110 Stat. 56 (1996).

[4] Memorandum Opinion and Order, *Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) from Enforcement of Obsolete ILEC Legacy Regulations That Inhibit Deployment of Next-Generation Networks*, 31 FCC Rcd 6157, ¶ 2 (2015) ("*2015 USTelecom Forbearance Order*").

they rely on the Act's facilities-sharing regulations to provide service, and that forbearance could threaten their business models. But even if true, that does not provide a valid basis to retain these regulations. They were intended to jump-start facilities-based competition in areas where such competition was likely to develop. They were not intended to subsidize competition permanently in areas where such competition would not otherwise emerge. But as the record here demonstrates, opponents argue that the provisions should be retained for precisely that purpose.

Many commenters also argue that the Commission's order rejecting Qwest's request for forbearance in Phoenix, Arizona, somehow requires the Commission to perform a competitive analysis for every geographic and product market in the country before it may grant the Petition. But as the D.C. Circuit has repeatedly and recently made clear, the statute contains no such requirement. Nor does the Commission's precedent require it. In the *Qwest Phoenix Forbearance Order*, the Commission performed a granular competitive analysis of the Phoenix MSA, because that is the only market for which forbearance was sought.[5] That order did not establish a broad precedent that a granular competitive analysis is required for each forbearance request, as the Commission has subsequently held.

The record also demonstrates that the Act's facilities-sharing provisions are not only unnecessary to fulfill the goals of the Act, but they also threaten to undermine them. These extreme economic regulations—which are largely without parallel or precedent in the U.S. economy—were enacted when nearly all consumers and businesses relied on the incumbent local

[5] Memorandum Opinion and Order, *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, 25 FCC Rcd 8622, ¶ 41 (2010) ("*Qwest Phoenix Forbearance Order*").

exchange carrier ("ILEC" or "incumbent LEC") for voice service, when wireless and broadband technologies were still in their early infancy, and when fiber had been deployed in only dense business districts. Then, requiring ILECs to share their facilities at prescribed prices was viewed as having potential benefits that outweighed the substantial costs that such regulations can impose. Whatever the merit of that calculus at the time, it no longer computes. Today, wireless and broadband are ubiquitous, and fiber reaches not only most business customers, but a significant percentage of consumers as well. In the wake of this radical transformation of the telecommunications landscape, the benefits of regulations that require facilities sharing at prescribed prices are minimal at best, and the costs are substantial.

As Professor Andres Lerner has demonstrated, as long as companies can take advantage of the mandates that require ILECs to share their facilities, they have a disincentive to make their own facilities-based investments.[6] These mandates also hamper the migration to next-generation services by distorting the marketplace.[7] Under the mandate, the cost of leasing UNEs are artificially lower than leasing wholesale services at market prices.[8] Thus, even if next-generation services provide better performance, this regulatory subsidy incentivizes competitive local exchange carriers ("CLECs") to continue offering legacy services by using UNEs.[9] Economists Kevin Caves and Hal Singer estimate that if the Commission granted forbearance "and all customers migrated to next-generation services more gradually, end-customers would save

[6] Andres V. Lerner, *An Economic Analysis of the Impact of Forbearance from 251(c)(3) on Competition and Investments* ¶ 42 (Aug. 6, 2018) ("Verizon Lerner Decl."), attached to Verizon Comments.

[7] *Id.* ¶ 47.

[8] *Id.* ¶ 51.

[9] *Id.*

$1 billion between 2018 and 2027, and enjoy additional consumer surplus of $29 million due to increased service quality."[10] The standard set forth in Section 160(a) for nationwide forbearance is satisfied here.

I. THE RECORD DEMONSTRATES THAT THE RELEVANT MARKETPLACES HAVE TRANSFORMED DRAMATICALLY SINCE 1996

Commenters that seek to preserve the unbundling, resale, and long-distance provisions of the Act do not attempt to dispute the dramatic transformation that has taken place, but they ignore these changes and their implications throughout their comments. They attempt to show that discrete pockets of the country have not seen the same gains as the rest of the country, and they argue that UNEs and resale are their only competitive option and thus must be preserved. But they describe the exception that proves the rule. Indeed, in Verizon's experience, approximately **[BEGIN HIGHLY CONFIDENTIAL] [END HIGHLY CONFIDENTIAL]** of its UNEs are purchased in counties the Commission deemed "competitive." Recognizing that there is no valid basis to retaining facilities-sharing mandates where facilities-based competition abounds, opponents attempt to paint a distorted picture, highlighting the few exceptions. In doing so, they further reveal precisely why nationwide forbearance is appropriate. As their comments make clear, the few CLECs using UNEs and resale in "non-competitive" areas, are serving areas where, by these providers' own admissions, and based on more than two decades of experience, facilities-based competition is unlikely to emerge.

[10] Hal Singer & Kevin Caves, *Assessing the Impact of Forbearance from 251(c)(3) on Consumers, Capital Investment, and Jobs*, at 4 (May 2018), attached to USTelecom's Petition.

A. The Comments Confirm That the Act's Facilities-Sharing Mandates Are Used Primarily for Business Data Services, Which the Commission Concluded Are Broadly Competitive

The Commission last year found that the business data services marketplace is subject to "substantial and growing competition" with "a large number of firms building fiber and competing for this business."[11] It observed "dramatic change in the market over the past decade" due to the entry of cable operators[12] and found that in areas where there is just a cable company competing with an ILEC, that is "sufficient enough to discipline pricing."[13] The Commission also found that "the market for business data services is dynamic with a large number of firms building fiber and competing for this business,"[14] including nearly 500 facilities-based companies.[15]

The Eighth Circuit has now upheld these determinations over a challenge from various CLECs.[16] The court found the Commission's analysis of the marketplace to be sound and that the Commission had offered "multiple reasoned rejections of both the CLEC Petitioners' economic theory and their evidence."[17] The court upheld the Commission's test for measuring competition in the marketplace, as well as its analysis of the marketplace using that test.[18] The

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[11] Report and Order, *Business Data Services in an Internet Protocol Environment*, 32 FCC Rcd 3459, ¶¶ 1-2 (2017) ("*Business Data Services Order*").

[12] *Id.* ¶ 55.

[13] *Id.* ¶ 83.

[14] *Id.* ¶ 2.

[15] *Id.*

[16] *Citizens Telecomms. Co. of Minn., LLC v. FCC*, --- F.3d ---, 2018 WL 4083352, at *10 (8th Cir. Aug. 28, 2018) (emphasis added).

[17] *Id.* at *11.

[18] *Id.* at *25, 26, 27.

court also affirmed the Commission's determination that where an ILEC faces competition from a cable operator, that alone "can sufficiently increase competition to make regulation unnecessary."[19] The court did also "vacate *solely* the portions of the final rule affecting TDM transport services," but only for lack of adequate notice, and on remand the Commission could, following a period of notice and comment, affirm its prior substantive decision based on the extensive data it has already collected to support its initial finding that transport services are competitive, while ensuring that it addresses any additional evidence and argument submitted in response to the post-remand public notice. Especially given the court's broad affirmance, there is no basis to revisit the findings of the *Business Data Services Order* in this proceeding, as some opponents urge.

Opponents of the Petition largely overlook the competitive reality for business data services. For example, in the hundreds of pages filed by CLECs opposing the Petition, "Comcast" is mentioned only five times,[20] and none of these CLECs acknowledges cable operators' dramatic success in providing business data services. Instead, they present an array of declarations from entities that assert that UNEs are pivotal to their business models.

But context is key. UNE volumes on the aggregate are small, accounting for *less than one-half of 1% of all* connections,[21] and the vast majority of these UNEs are used in areas that

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[19] *Id.* at *28.

[20] *See* INCOMPAS et al. Comments at 4, 20; Sonic Comments at 18; Sonic Jasper Decl. ¶¶ 13, 19. Each reference to Comcast is in connection to the assertion that Sonic deployed fiber in San Francisco before Comcast.

[21] *See* Petition at 17 (citing data from Ind. Anal. & Tech. Div., Wireline Comp. Bur., FCC, *Voice Telephone Services: Status as of December 31, 2016*, at 8, Table 1 (Feb. 2018) ("*FCC Dec. 2016 Voice Telephone Services Report*")); Verizon Comments at 19 n.72.

the Commission has already concluded are competitive. Indeed, as noted above, approximately **[BEGIN HIGHLY CONFIDENTIAL] [END HIGHLY CONFIDENTIAL]** of all UNEs that Verizon provides are in competitive counties, where Congress's goal of jump-starting competition through facilities-sharing mandates has already been achieved, and continued enforcement of these mandates only serves to further distort the marketplace.

Instead of rebutting these broad trends, opponents highlight the small minority of places where UNEs are being used in "non-competitive" areas. In doing so, these opponents concede that they rely on UNEs in areas where UNEs will not function as a transitional mechanism to facilities-based competition.[22] As First Communications explains, for example, "[t]here is typically insufficient demand at these customer locations to justify a capital investment by competitors to extend their own facilities to these locations."[23] These CLECs seek to maintain UNEs not to jumpstart facilities-based competition, but to force ILECs to perpetually subsidize CLECs where CLECs do not intend to build out their own facilities. Indeed, Blackfoot Communications admits that its strategy is based on "access [to UNEs] for the *foreseeable future*."[24]

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[22] First Communications Comments at 17 (stating that it uses UNEs where it is not profitable "for a facilities-based CLEC or the cable company to extend facilities to [a rural] location for such a small volume of business"); *see also* INCOMPAS et al. Alcaraz (Race) Decl. ¶ 6 ("The use of UNEs enables Race to serve unserved and underserved markets that would normally not be feasible due to the cost of deploying networks in these markets—as is evidenced by the lack of broadband services in these markets.").

[23] First Communications Comments at 18; *see also* Wholesale Voice Line Coalition Comments at 1-2 (conceding that its members serve business customers at "dispersed, often suburban, rural and remote locations . . . where facilities-based competition with the ILEC is uneconomical for any provider, including the cable company and the ILECs who remain unable to justify fiber deployment").

[24] Blackfoot Communications Comments at 5 (emphasis added).

Commenters incorrectly assume that without UNEs, they will be unable to serve these identified markets. If the Commission were to grant forbearance, however, ILECs would have strong business incentives to continue providing wholesale services, and they would be required to provide this access on just and reasonable terms.[25] In areas where the Commission in the *Business Data Services Order* found competition insufficient to warrant the removal of ex ante regulation, price caps are in place, and the Commission adjusted the productivity X-factor to further constrain prices.[26] The Commission also has programs such as Connect America Fund to develop voice and data services in markets that remain underserved.[27] Congress never envisioned that the unbundling provisions would be used to require ILECs to indefinitely subsidize service in areas that are not conducive to facilities-based competition.

Relatedly, commenters warn that if they lose UNE access in three years, their customers will be without a competitive alternative.[28] The proposed three-year transition period will provide ample time for further wholesale alternatives to develop, and for CLECs to smoothly

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[25] *See infra* pp. 16-18.

[26] *See infra* pp. 18-19; *see also Business Data Services Order* ¶ 179 (explaining that in non-competitive areas, prices caps would require ILECs to provide just and reasonable rates). The Commission excluded from this obligation 69 counties that it had previously granted Phase II pricing flexibility. The Commission concluded that "the costs of reinstituting price caps for carriers previously granted Phase II pricing flexibility in [those] counties outweigh the potential benefits." *Id.* ¶ 181.

[27] *See* Report and Order and Further Notice of Proposed Rulemaking, *Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing a Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up; Universal Service Reform—Mobility Fund*, 26 FCC Rcd 17663, ¶ 48 (2011).

[28] *See*, *e.g.*, INCOMPAS et al. Buckingham (Digital West) Decl. ¶ 8 (predicting that "[i]f Digital West lost access to UNEs, the[n] 80% of existing customers . . . would have to be advised to seek service with very unpopular cable or incumbent telephone companies").

transition away from UNEs. These commenters do not propose a transition period of any length that would lead them to invest in their own facilities. This is because their true complaint is that without access to UNEs, they will be unable to provide service under their existing business model. But the Commission's purpose is to promote competition, and promote facilities-based competition where possible, not to protect individual competitors or subsidize particular business models.

B. The Record Also Confirms That Voice Services Are Highly Competitive

The Commission has found that consumers are abandoning their landlines and "depending less and less on . . . incumbent LECs to facilitate communications across state lines."[29] According to the Commission's most recent data, which is from December 2016, "there were 58 million end-user switched access lines in service, 63 million interconnected VoIP subscriptions, and 341 million mobile subscriptions in the United States."[30] These factors, along with the adoption of bill-and-keep as a new method of intercarrier compensation, led the Commission to conclude more than two years ago that "incumbent LECs cannot control prices for, and thus lack market power over, interstate switched access."[31] Here, too, this conclusion is even stronger today, and there is no basis to revisit it.[32]

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[29] Declaratory Ruling, Second Report and Order, and Order on Reconsideration, *Technology Transitions; USTelecom Petition for Declaratory Ruling That Incumbent Local Exchange Carriers Are Non-Dominant in the Provision of Switched Access Services*, 31 FCC Rcd 8283, ¶ 17 (2016) ("*Technology Transitions Order*").

[30] *FCC Dec. 2016 Voice Telephone Services Report* at 2.

[31] *Technology Transitions Order* ¶ 22.

[32] *See* CPUC Comments at 11 ("[T]he market has evolved, and wireless telecommunications subscriptions, specifically mobile subscriptions, now dominate the market.").

The commenters that oppose forbearance attempt to show that they are continuing to rely on UNEs and resale to provide voice services. But the evidence they submit confirms that their use of these regulatory mechanisms is extremely limited overall, and is concentrated in communities where facilities-based competition is unlikely to occur.[33] Similar to business data services, these CLECs want UNEs and mandated resale to force ILECs to prop up CLECs indefinitely in areas where it will not be economically practical to invest in facilities.[34] But as discussed below, Congress viewed these facilities-sharing mandates as mechanisms to provide a transition to facilities-based competition. It did not expect CLECs to develop business models that relied on them indefinitely.

Furthermore, the Commission has launched programs to provide voice services in the areas served by commenters objecting to forbearance. For example, the Commission announced in February 2017 that under Mobility Fund Phase II, it had allocated $4.53 billion over the next ten years "to provide ongoing support for the provision of service in areas that lack adequate

[33] *See*, *e.g.*, INCOMPAS et al. Kohly (Socket) Decl. ¶ 13 (Socket takes advantage of Section 251(c)(4) to "reach[ ] small, remote locations that only need voice-services").

[34] *See*, *e.g.*, Blackfoot Communications Comments at 5 (explaining that in providing voice and business data services, "UNE loops are often the only economically priced delivery options that are available to CLECs in Montana and Idaho"); INCOMPAS et al. Denney (AllStream) Decl. ¶ 7 ("Allstream also uses interoffice transport UNEs, including unbundled dark fiber, when its own facilities are not available, to carry voice and data traffic to centralized switches or its data network. At present, approximately 95% of our customers are served in whole or in part over UNEs."); INCOMPAS et al. Buckingham (Digital West) Decl. ¶¶ 5, 8 (explaining that "majority of [its] customers—approximately 2,000—are served in whole or in part over UNEs" and that "loss of UNEs would eliminate our ability to serve many customers altogether").

mobile voice and broadband coverage absent subsidies."[35] Thus, the Commission has already shown a commitment to expanding voice services in these areas.

Commenters such as Granite also claim that without continued access to resale at an avoided-costs discount under Section 251(c)(4), they will be unable to continue providing traditional TDM services.[36] But, as the Commission found in the *Business Data Services Order*, TDM technology is rapidly becoming obsolete, because "existing customers of TDM-based service are switching to Ethernet."[37] This same transition away from TDM is occurring in retail voice services where customers are switching to mobile services and VOIP services at a staggering rate. In light of these trends, the Commission has already determined that copper lines will be retired, and that "it is important to spur the process along rather than slow it down with unnecessary regulatory burdens."[38] Consistent with that goal, the Commission need not maintain the resale obligations of Section 251(c)(4) in the hopes of indefinitely preserving antiquated technology.[39]

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[35] Order on Reconsideration and Second Report and Order, *Connect America Fund Universal Service Reform – Mobility Fund*, 32 FCC Rcd 6282, ¶ 2 (2017).

[36] Granite Comments at 15-37; INCOMPAS et al. Comments at 72-74; ICG CLEC Coalition Comments at 9; MetTel Comments at 4-10. Traditional TDM service refers to "the provision of TDM-based business telephone services provided via copper loops." Granite Comments at 3.

[37] *Business Data Services Order* ¶¶ 25-26.

[38] Report and Order, Declaratory Ruling, and Further Notice of Proposed Rulemaking, *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, 32 FCC Rcd 11128, ¶ 33 (2017) ("*Wireline Infrastructure Order*").

[39] Granite and others will still likely be able to access resold copper lines even if the Commission grants forbearance from the resale mandate. Granite already uses commercial wholesale agreements for most of its leasing arrangements. Granite Comments at 25. Avoided-cost resale accounts for roughly **[BEGIN HIGHLY CONFIDENTIAL] [END HIGHLY CONFIDENTIAL]** of TDM voice lines provided by Granite. Granite Comments at 25.

II. THE RECORD SUPPORTS GRANTING FORBEARANCE NATIONWIDE

Section 10 of the Act, 47 U.S.C. § 160, requires the Commission to forbear "if enforcement is unnecessary to ensure that rates and practices are just, reasonable, and not unreasonably discriminatory; enforcement is unnecessary to protect consumers; and forbearance is consistent with the public interest, in that it 'will promote competitive market conditions' and 'enhance competition among providers of telecommunications services.'"[40] The record demonstrates that the radical transformation of the telecommunications industry since the passage of the 1996 Act has rendered its facilities-sharing mandates unnecessary and potentially counterproductive, and that each of the statutory forbearance requirements is satisfied. Seeking forbearance at the national level is appropriate, and the Commission need not undertake a granular market-by-market analysis.

A. The Record Confirms That the Commission Should Grant the Relief Requested

1. The Current Use of UNEs Is Contrary to the Intent of the 1996 Act

Congress viewed UNEs and mandated resale as a transitional way to *jump-start* competition.[41] As the Commission has recognized, the 1996 Act envisioned that CLECs would use UNEs only until "it was practical and economically feasible to construct their own networks."[42] The goal was "not to impose the associated regulatory burdens on incumbent LECs

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[40] *Ad Hoc Telecomms. Users Comm. v. FCC*, 572 F.3d 903, 907 (D.C. Cir. 2009) (quoting 47 U.S.C. § 160). Although these provisions are listed as three separate conditions, there is a "great deal of overlap" between them. *Verizon v. FCC*, 770 F.3d 961, 964 (D.C. Cir. 2014) (reasoning that "it is hard to imagine any action that would enhance competition satisfying the public interest that actually would not also satisfy the first two factors").

[41] Remarks of Sen. Breaux (La.) on Pub. L. No. 104-104, 141 Cong. Rec. 15572 (1995).

[42] Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696,

indefinitely."[43] Now, more than two decades since the Act, there is a robust track record to evaluate how well UNEs continue to serve their intended purpose.

CLECs that have structured their business models around UNEs and resale argue that they could not compete without them.[44] But even if that were true, it would be an insufficient basis to retain these invasive regulations. The Act was not intended to prop up competitors or to perpetuate business models reliant on other providers' networks, but to create meaningful facilities-based competition.[45] As the Commission explained in the *Business Data Services Order*, its "duty is to protect efficient competition, not competitors."[46] Nor would it be reasonable for the Commission to conclude that the current use of UNEs is likely to help

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¶ 6 (1999), *vacated and remanded*, *United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002); *see also U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 576 (D.C. Cir. 2004) ("*USTA II*") (explaining that the Act was designed to promote "genuine, facilities-based competition"); Verizon Comments at 5-8.

[43] *Wireline Infrastructure Order* ¶ 32 (describing the Commission's approach to implementing the Act).

[44] INCOMPAS et al. Kittredge (GWI) Decl. ¶ 10 (stating that without access to UNEs, "we would pull out of roughly 30% of the approximately 60 markets" that it services); INCOMPAS et al. Bubb (Gorge) Decl. ¶ 8 ("The loss of access to UNEs would significantly affect our ability to continue to provide service in a number of markets."); Blackfoot Communications Comments at 16 (contending that "business customers in Montana, Idaho and potentially other rural states (i.e. Wyoming) are at risk because the elimination of access to UNE loops at affordable rates places in jeopardy Blackfoot's ability to compete"); Sonic Comments at 17 ("The loss of critical UNEs would limit or shut down Sonic's ability to serve *current* customers.") (emphasis added); Granite Comments at 34 ("Without the avoided-cost discount, it would no longer be profitable for Granite to service many of [its] small customers.").

[45] *See USTA II*, 359 F.3d at 576 (explaining that the Act was not meant "to provide the widest possible unbundling, or to guarantee competitors access to ILEC network elements at the lowest price that government may lawfully mandate," but instead to "stimulate competition").

[46] *Business Data Services Order* ¶ 290; *cf. SBC Communications Inc. v. FCC*, 56 F.3d 1484, 1491 (D.C. Cir. 1995) ("The Commission is not at liberty, however, to subordinate the public interest to the interest of 'equalizing competition among competitors.'") (quoting *Hawaiian Tel. Co. v. FCC*, 498 F.2d 771, 776 (D.C. Cir. 1974)).

facilities-based competition in the future. After more than two decades, facilities-based competition has emerged in the many areas where such competition is economic. In areas where that has not occurred over those two decades, there is no basis to think economic conditions will change sufficiently to attract such competition. To the contrary, these CLECs concede that they rely on UNEs to serve markets where there is "insufficient demand . . . to justify a capital investment" in new facilities,[47] and will therefore need UNEs for the "foreseeable future."[48]

Because the Act's facilities-sharing mandates are no longer being used for their intended purpose, the benefits of retaining these provisions are greatly diminished. By contrast, and as the Supreme Court and the D.C. Circuit have recognized, retaining these types of regulations necessarily entail costs as well.[49] Here, for example, the unbundling and resale mandates distort investment incentives,[50] and hamper the migration to next-generation services.[51] Also, these regulations unfairly give an advantage to cable operators, which also operate incumbent networks used to provide business data and voice services, yet are subject to no similar

[47] First Communications Comments at 18; *see supra* pp. 7-8.

[48] Blackfoot Communications Comments at 5.

[49] *See Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407-08 (2004) ("Compelling such firms to share the source of their advantage is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities."); *U.S. Telecom Ass'n v. FCC*, 290 F.3d 415, 429 (D.C. Cir. 2002) (explaining that "mandatory unbundling comes at a cost, including disincentives to research and development by both ILECs and CLECs and the tangled management inherent in shared use of a common resource"); *see also AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 429 (1999) (Breyer, J. concurring in part and dissenting in part) ("The more complex the facilities, the more central their relation to the firm's managerial responsibilities, the more extensive the sharing demanded, the more likely these costs will become serious.").

[50] Verizon Lerner Decl. ¶ 42.

[51] *Id*. ¶ 47.

regulation requiring that they provide subsidized access to their networks. This distortion further imposes costs on the industry and impedes migration to next-generation services.[52]

2. The Act's Facilities-Sharing Mandates Are Unnecessary To Protect Consumers, and Forbearance Is in the Public Interest

Continued enforcement of the facilities-sharing mandates also is not necessary to protect consumers, and will instead impose costs that could slow the advancement of next-generation technologies. As explained above, most American businesses and consumers have competitive options that do not rely on these regulatory mandates. For those customers, many factors, such as competition between a cable company and an ILEC, are "sufficient enough to discipline pricing,"[53] and forbearance will only serve to facilitate further investment in advanced technologies, "relieving carriers from having to focus resources on complying with outdated legacy regulations that were based on technological and market conditions that differ from today."[54]

In the areas today where these facilities-sharing mandates are still used, market forces will ensure rates remain just and reasonable and that consumers are protected. For example, incumbent local exchange carriers will continue to make available regulated and commercial

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[52] *Id.*

[53] *Business Services Data Order* ¶ 83. Despite the comments of CLECs opposing forbearance, the Commission noted just last year that "[c]ompetitive LECs such as Zayo and Birch continue to invest and expand their competitive fiber networks with very successful results." *Id.* ¶ 2. Even smaller providers, including Virginia Global, Gorge, and DayStarr have built out their own fiber. *See* INCOMPAS et al. Comments at 4; MITA Rose (DayStarr) Decl. ¶¶ 5-6.

[54] *2015 USTelecom Forbearance Order* ¶ 2.

wholesale offerings, as will other facilities-based providers.[55] Although commenters contend that there are "no viable competitive alternatives," they uniformly concede that what they really mean is that there are no competitive alternatives at regulated prices.[56] But the contention that prices will somehow be supracompetitive has no basis in market realities.

As the Commission explained in the *2015 USTelecom Forbearance Order*, "both incumbent and competitive LECs remain subject to sections 201 and 202 of the Act, under which carriers are subject to penalty for conduct that is unjust, unreasonable or unjustly or unreasonably discriminatory."[57] Customers can bring Section 208 complaints to enforce compliance with those provisions, and like the Commission explained in the *2015 USTelecom Forbearance Order*, such enforcement mechanisms will be usefully protective.[58]

Additionally, like in the *2015 USTelecom Forbearance Order*, in the overwhelming majority of localities, "intermodal competition from cable and other competing providers" will "operate as a constraint on incumbent rates and practices."[59] This is true in the areas identified in

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[55] Petition at 29 (explaining that "ILEC's . . . have incentives to deal reasonably with wholesale customers and to recover the heavy cost of network investment by getting more traffic on their networks").

[56] *See*, *e.g.*, INCOMPAS et al. Comments at 7 ("Special access DS1 and DS3 channel terminations as well as transport services are all priced substantially higher than UNEs."); TPx Comments at 19 ("If DS0 loops were no longer available as UNEs, TPx would have to cease offering broadband service via EoC to nearly 14,000 customer locations and find a different means to deliver broadband to those customers *or pass through the price increases associated with commercial substitutes* for UNEs eventually developed by the incumbent LECs.") (emphasis added); Sonic Comments at 15 ("Similarly, for customers in rural areas, the DS1 UNE loop is the only economic option for providing affordable service. The commercial alternative is three times the cost of a DS1 UNE loop.").

[57] *2015 USTelecom Forbearance Order* ¶ 60.

[58] *Id.* ¶ 18.

[59] *Id.* ¶ 60. CLECs contend that the *Qwest Phoenix Forbearance Order* states "that an ILEC and cable company duopoly is insufficient to warrant forbearance from legacy unbundling

the *Business Data Services Order* as sufficiently "competitive" to discipline pricing without price-cap regulation, which contain more than 91% of consumers,[60] and for Verizon, are where approximately **[BEGIN HIGHLY CONFIDENTIAL] [END HIGHLY CONFIDENTIAL]** of UNEs are located. And, contrary to what INCOMPAS claims, the *Business Data Services Order* expressly found that these areas were competitive without relying on UNEs at all.[61] Thus the Commission has already concluded that customers are sufficiently protected in these locations without UNEs. Consumers are also adequately protected in the voice market where, in light of the vast changes in the marketplace and the adoption of bill-and-keep intercarrier compensation, the Commission has concluded that "incumbent LECs cannot control

obligations." Wholesale Voice Line Coalition Comments at 20; *see also* Call One Comments at 6 ("For sure, the ILECs face competition from cable providers for these services, but a duopoly is not competition.); First Communications Comments at 18 ("In any event, the Commission has found that an ILEC and cable company duopoly is insufficient to warrant forbearance from legacy unbundling obligations."). The Commission has already rejected this argument, and the overwhelmingly majority of Americans have far more than two competitive options for voice services. In the *Business Data Services Order*, the Commission rejected the CLECs' request for a "blanket finding . . . that two competitors are insufficient to constrain incumbent LEC pricing," finding that the Qwest Phoenix Order "specifically recognized that 'under certain conditions duopoly will yield a competitive outcome.'" *Business Data Services Order* ¶ 121 (quoting *Qwest Phoenix Forbearance Order* ¶ 3). The business data services market, the Commission explained, represented a prototypical example of those competitive circumstances: "the high sunk cost nature of the business data services market gives providers the incentive to extend their network facilities to new locations with demand even when those locations contribute revenue only marginally above the incremental cost of the network extension." *Id.* The Eighth Circuit affirmed this analysis, noting that the Commission was not bound by *Qwest Phoenix* and that, "[e]ven if the Qwest/Phoenix unbundling adjudication were somehow binding, it did not create any bright line rule about when duopolies are competitive." *Citizens Telecomms.*, 2018 WL 4083352, at *13.

[60] *See Business Data Services Order* ¶¶ 141, 179.

[61] *Id.* ¶ 132 n.401 ("Our analysis of competitive provider facilities does not include UNEs because the availability of UNEs is both restricted by our rules . . . and is declining in the market as incumbent LECs transition their circuit-switched to packet-based business data services.").

prices for, and thus lack market power over, interstate switched access."[62]

Finally, as INCOMPAS and others neglect to note, the select counties that the Commission found were not competitive in the *Business Data Services Order* are subject to strict price cap regulation and increased annual productivity offsets.[63] The decision to enforce price cap regulation in those areas was a direct implementation of Sections 201's and 202's requirements related to just, reasonable, and nondiscriminatory rates. And, critically, in that proceeding, the Commission agreed with both Verizon *and* INCOMPAS that such "price cap regulation is the most effective regime for ensuring that rates for non-competitive services are just and reasonable."[64] In light of this carefully calibrated rate regulation which the Commission already assumed did not include UNEs, UNEs are not needed to protect consumers in these areas.[65] The Commission regularly concludes that regulatory backstops much similar to these are adequate to justify forbearance,[66] and the Commission should come to the same conclusion here.

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[62] *Technology Transitions Order* ¶ 22.

[63] *See Business Data Services Order* ¶ 179 (explaining that in non-competitive areas, prices caps would require ILECs to provide just and reasonable rates). The Commission excluded from this obligation 69 counties that it had previously granted Phase II pricing flexibility. The Commission concluded that "the costs of reinstituting price caps for carriers previously granted Phase II pricing flexibility in [those] counties outweigh the potential benefits." *Id.* ¶ 181.

[64] *Id.* ¶ 179.

[65] Programs such as the Connect America Fund and Mobility Fund Phase II will expand voice and broadband services in these areas. *See supra* pp. 8, 10-11.

[66] *See*, *e.g.*, Report and Order on Remand, Declaratory Ruling, and Order, *Protecting and Promoting the Open Internet*, 30 FCC Rcd 5601, ¶ 4 (2015) ("*2015 Open Internet Order*") ("Instead, we utilize the regulatory backstop of sections 201 and 202, as well as related enforcement provisions, to provide oversight over traffic exchange arrangements between a broadband Internet access service provider and other networks."); Memorandum Opinion and Order and Report and Order and Further Notice of Proposed Rulemaking and Second Further Notice of Proposed Rulemaking, *Petition of USTelecom for Forbearance Under 47 U.S.C.*

Forbearance from facilities-sharing mandates at regulated prices is also in the public interest because it will increase investment incentives and accelerate migration to next-generation services by removing market distortions. As Dr. Andres Lerner explained in his Declaration, regulation of competitive industries distorts the market and hurts consumers.[67] Continuing to require ILECs to share facilities diminishes their incentives "to invest in the upgrade and maintenance of existing facilities, and to invest in new facilities."[68] These regulatory mandates also discourage CLECs from investing in their own facilities because they

§ 160(c) from Enforcement of Certain Legacy Telecommunications Regulations, 28 FCC Rcd 7627, ¶¶ 107-108 (2013) ("*2013 USTelecom Forbearance Order*") (granting forbearance from certain cost assignment rules where conditions imposed on the forbearance and other still-applicable rules and requirements were adequate to meet the Commission's needs); *id.* ¶¶ 104-106 (granting forbearance from certain reporting requirements in light of other still-applicable regulatory requirements and conditions on forbearance); *id.* ¶¶ 142-148 (forbearing from separate affiliate requirements given other still-applicable regulatory requirements and conditions on forbearance); *id.* ¶ 175 (forbearing from rules governing recording of conversations with the telephone company in light of other, still-applicable legal requirements); First Report and Order, *Review of Foreign Ownership Policies for Common Carrier and Aeronautical Radio Licensees*, 27 FCC Rcd 9832, ¶ 20 (2012) (incorporating Section 310(b)(4) requirements in order to satisfy Section 10(a)(3) forbearance standard for Section 310(b)(3) in certain cases); Order, *Petition for Forbearance of Iowa Telecommunications Services, Inc. d/b/a/ Iowa Telecom Pursuant to 47 U.S.C. § 160(c) from the Deadline for Price Cap Carriers to Elect Interstate Access Rates Based on The CALLS Order or a Forward Looking Cost Study*, 17 FCC Rcd 24319, ¶¶ 18-19 (2002) (granting forbearance from an interstate switched access rate regulation to allow rates to be reset at a forward-looking cost level in light of the protections of the forward-looking cost approach to setting the rate and other, still-applicable legal requirements); Memorandum Opinion and Order, *Petition for Forbearance from Application of the Communications Act of 1934, as Amended, to Previously Authorized Services*, 12 FCC Rcd 8408, ¶¶ 9-10 (Common Car. Bur. 1997) (granting forbearance from Section 203 for purposes of providing a refund in light of other, still-applicable legal requirements); *see also*, *e.g.*, Second Report and Order, *Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Servs.*, 9 FCC Rcd 1411, ¶ 176 (1994) (granting forbearance under Section 332(c)(1)(A) from Section 205 in light of other, still-applicable enforcement provisions).

[67] Verizon Lerner Decl. ¶ 6.

[68] *Id.* ¶ 40.

can take advantage of the ILEC's facilities at regulated prices.[69] Indeed, empirical data demonstrates that less facilities-based investment occurs when UNE prices are lower.[70] By granting forbearance, prices for legacy services will conform to competitive market rates and CLECs will discontinue their inefficient networks.[71] This will accelerate migration to next-generation services, which is in the public interest.

B. Granting Nationwide Forbearance Is Appropriate When the Competitive Landscape Across the Country Has Changed

The Commission should grant forbearance on a nationwide basis based on the profound transformation of the telecommunications industry over the last two-plus decades, which has rendered the Act's unbundling, resale, and long-distance provisions unnecessary. The CLECs argue that the Commission must deny the Petition because it does not perform a granular market-by-market analysis of local competition.[72] This argument conflicts with the settled

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[69] *Id.* ¶ 42.

[70] Robert W. Crandall et al., *Do Unbundling Policies Discourage CLEC Facilities-Based Investment?*, 4 B.E. J. Econ. Analysis & Policy 1, 20 (2004); Robert W. Crandall et al., *The Long-Run Effects of Copper-Loop Unbundling and the Implications for Fiber*, 37 Telecomm. Pol'y 262, 266 (2013) ("[T]he evidence suggests strongly that unbundling policies have reduced investment in network infrastructure.").

[71] Verizon Lerner Decl. ¶ 54.

[72] *See*, *e.g.*, First Communications Comments at 9 ("Section 10 requires the Commission to engage in a rigorous analysis of competition 'by defining the relevant product and geographic markets' and 'examining whether there are any carriers in those markets that, individually or jointly, possess significant market power.'") (quoting *Qwest Phoenix Forbearance Order* ¶¶ 21, 42); TPx Comments at 9 (same); Granite Comments at 13 (asserting that the Commission must engage the "traditional market power framework, including the use of appropriately granular relevant markets."); INCOMPAS et al. Comments at 64 ("Under the Commission's framework for evaluating competition in forbearance proceedings, wholesale and retail markets must be analyzed separately, and the petitioner must demonstrate that there is effective facilities-based competition in either the wholesale or retail market in each relevant product and geographic market."); Wholesale Voice Line Coalition Comments at 9 ("The Commission must engage in a rigorous analysis of competition by defining the relevant product and geographic markets and

understanding of Section 10, which the Commission and D.C. Circuit have expressly concluded "imposes no particular mode of market analysis or level of geographic rigor."[73] Because the statute does not require a particular mode of analysis, courts have deferred to the Commission's analytical approach to ruling on a forbearance petition.[74]

The Commission has held many times that forbearance is appropriate on a nationwide basis where (like here) "the changing communications landscape throughout the country" has rendered legacy regulations outmoded and unnecessary for their intended purpose.[75] The CLECs who argue that the Commission must deny the Petition because USTelecom did not provide

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examining whether there are any carriers in those markets that, individually or jointly, possess significant market power.") (internal quotation marks omitted).

[73] *EarthLink, Inc. v. FCC*, 462 F.3d 1, 8 (D.C. Cir. 2006); *see also U.S. Telecom Ass'n v. FCC*, 825 F.3d 674, 706 (D.C. Cir. 2016) (explaining that any mode of analysis done by the Commission will be upheld as long as the Commission has articulated a rational connection between the facts found and its chosen method of analysis).

[74] *See Qwest Corp. v. FCC*, 689 F.3d 1214, 1230 (10th Cir. 2012) (affirming the *Phoenix Forbearance Order* because "the Commission [had] offered a reasonable explanation for its movement to a market-power analytical framework"); *EarthLink*, 462 F.3d at 7 (applying *Chevron* deference to the Commission's interpretation of Section 10); *see also United States Telecom Ass'n*, 825 F.3d at 728 (explaining that *EarthLink* "forecloses th[e] argument" that the Commission cannot grant forbearance on a nationwide level).

[75] *2015 USTelecom Forbearance Order* ¶ 9; *see also*, *e.g.*, *2013 USTelecom Forbearance Order*; Memorandum Opinion and Order, *Petition for Forbearance of the Verizon Telephone Companies Pursuant to § 160(c)*, 19 FCC Rcd 21496 (2004) ("*Section 271 Broadband Forbearance Order*"); Report and Order, *Amendment to the Commission's Rules Concerning Effective Competition*, 30 FCC Rcd 6576 (2015); Memorandum Opinion and Order, *Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services*; *Petition of Bellsouth Corp. for Forbearance Under Section 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services*, 22 FCC Rcd 18705, ¶ 23 (2007) (recognizing that, although "the record in this proceeding does not include detailed market share information for particular enterprise broadband services," the data demonstrate that "the marketplace generally appears highly competitive" and thus the Commission did "not find it essential to have such detailed information").

market-by-by statistics rely exclusively on the Commission's *Qwest Phoenix Forbearance Order*, which is inapposite. In the *Qwest Phoenix Forbearance Order*, the Commission performed a granular competitive analysis of the Phoenix MSA, because that is the only market for which forbearance was sought.[76] It did not establish a broad precedent that a localized competitive analysis is required for each forbearance request, as the Commission has subsequently held.

Each time parties have argued that Section 10 requires a granular analysis of competition, the argument has been rejected. In *EarthLink, Inc. v. FCC*, the CLECs challenged the Commission's nationwide analysis in the *Section 271 Broadband Forbearance Order*. In that proceeding, the Bell Operating Companies filed a petition for nationwide forbearance from Section 271's independent unbundling obligations to the broadband elements that the Commission had previously relieved from unbundling under Section 251.[77] The Commission granted forbearance on a nationwide basis in light of several broad competitive trends, including the expected rise of other "promising access technologies on the horizon" such as fixed wireless, satellite, and broadband over powerline, and the CLECs' continued ability to compete in the broadband market effectively.[78]

On appeal, EarthLink asserted that the differences in competition in various markets demanded a localized inquiry.[79] It argued that, in many local markets, customers had only two providers to choose from, and that "17% of consumers were served by just one broadband

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[76] *Qwest Phoenix Forbearance Order* ¶ 41.

[77] *Section 271 Broadband Forbearance Order* ¶¶ 1-2.

[78] *Id.* ¶¶ 21-22.

[79] Final Brief of Petitioner at 27-29, *EarthLink, Inc. v. FCC*, 462 F.3d 1.

provider."[80] EarthLink asserted that, in light of these differences, the Commission could not "forbear on a nationwide basis" "without considering more localized regions individually."[81] The D.C. Circuit rejected the argument, holding "[o]n its face, the statute imposes no particular mode of market analysis or level of geographic rigor."[82]

In *United States Telecom Ass'n v. FCC*, the D.C. Circuit explicitly confirmed *EarthLink*'s holding in the face of a challenge to the Commission's grant of nationwide forbearance from the unbundling provisions of Section 251 in the *2015 Open Internet Order*. There, Full Service Network asserted that Section 10(a)(3)'s public interest determination "must be made for each regulation, provision and market . . . using the definition and context of that provision in the [Communications] Act."[83] Like commenters here, Full Service Network asserted that "[b]ecause section 251 applies to 'local exchange carriers,' . . . the geographic market, as the name implies and the definition in the [Communications] Act confirms, is local and not national."[84] Reinforcing the holding in *EarthLink*, the court rejected this argument, affirming forbearance and stating that "Full Service Network cannot rope section 251's requirements into the Commission's section 10 analysis."[85]

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[80] *Id.* at 27 n.84.

[81] *EarthLink*, 462 F.3d at 8.

[82] *Id.*

[83] 825 F.3d at 728.

[84] *Id.*

[85] *Id.* at 729. Some commenters argue that the *2015 Open Internet Order* is not instructive because "'a different analysis' than the traditional market power analysis 'may apply when the Commission addresses [a forbearance petition involving] advanced services, like broadband services, instead of a petition addressing legacy facilities,'" in part because "Section 706 of the 1996 Act 'explicitly directs the FCC to "utiliz[e]" forbearance to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans."'" Granite Comments at 14 (quoting *Qwest Phoenix Forbearance Order* ¶¶ 39, 439; *EarthLink*, 462

Consistent with these decisions, the Commission has granted nationwide forbearance without conducting localized market-power assessments many times, including in response to two petitions of USTelecom concerning legacy voice regulations. In the *2013 USTelecom Forbearance Order*, the Commission granted nationwide forbearance with respect to regulations on ILEC provision of interexchange access services, such as the Equal Access Scripting Requirement requiring ILECs to tell prospective customers about their choice of long-distance providers.[86] The Commission rejected arguments that nationwide forbearance was inappropriate because there were still "areas where the ILEC is the only provider of wireline local exchange service," and found there was no need to distinguish between different geographic areas because the overall interexchange "market ha[d] changed dramatically in the more than 25 years since the requirement was established" and, therefore, such legacy regulations were no longer needed.[87]

Even more recently, in the *2015 USTelecom Forbearance Order*, the Commission granted USTelecom's petition for nationwide forbearance from certain facilities-sharing regulations, including the requirement that ILECs unbundle "a 64 kbps voice-grade channel to provide narrowband services over fiber where an incumbent LEC retires a copper loop it has overbuilt with a fiber-to-the-home or fiber-to-the-curb loop."[88] Mirroring the arguments they

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F.3d at 8-9). The nationwide forbearance granted in the *2013 USTelecom Forbearance Order* and *2015 USTelecom Forbearance Order* on provisions addressing "legacy facilities" necessarily forecloses reading *EarthLink* and the *2015 Open Internet Order* so narrowly. In all events, Section 706's instruction is equally applicable here. Business data services, which most UNEs are used to support, are regularly regulated under the Commission's Section 706 authority. *See*, *e.g.*, *Business Data Services Order* ¶¶ 11, 315 (exercising the Commission's authority under Section 706).

[86] *2013 USTelecom Forbearance Order* ¶ 11.

[87] *Id.* ¶ 14.

[88] *2015 USTelecom Forbearance Order* ¶ 55.

make here, the CLECs in that proceeding acknowledged that nationwide demand for unbundled 64 kbps channels was low, but claimed they needed this requirement "to protect business customers such as chains of convenience stores or gas stations that operate at numerous locations, often geographically dispersed, that require only a handful of telephone lines at each location."[89] The Commission rejected this argument, explaining that analyzing competition on a localized basis is unnecessary unless a party is specifically moving for relief in a specific market based on evidence of competition uniquely in that market.[90]

Consistent with this precedent, the Commission need not engage in a granular market analysis here. USTelecom has requested forbearance on a nationwide basis based on significant changes in the underlying telecommunications marketplace that have rendered these provisions outmoded and harmful nationwide. As in the *Section 271 Broadband Forbearance Order* and the *2015 USTelecom Order*, CLECs operating in a few rural markets that buck the national trends are demanding localized inquiries. And just as it did in those proceedings, the Commission should not let the tail wag the dog.

Ignoring that the Commission has previously granted nationwide forbearance without a granular assessment of local markets, the CLECs argue the *Qwest Phoenix Forbearance Order* requires such an approach.[91] But in that proceeding, the Commission engaged in a granular

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[89] *Id.* ¶ 63.

[90] *Id.* ¶ 9.

[91] *See*, *e.g.*, INCOMPAS et al. Comments at 37 ("[T]he Commission's framework adopted in the *Qwest Phoenix Forbearance Order* . . . require[s] granular market analysis when evaluating a petition to forbear from Section 251(c) unbundling requirements."); Granite Comments at 11-14 (same); TPx Comments at 11 ("The Commission should apply the *Phoenix* market test rather than a nationwide test in evaluating USTelecom's petition."); First Communications Comments at 5 ("The Commission must apply the *Qwest Phoenix* Forbearance Standard to USTelecom's Petition"); Wholesale Voice Line Coalition Comments at 6 (same); Liberty Cablevision of

analysis of the Phoenix market relief, because Qwest's petition was focused only on that market.[92] The *Qwest Phoenix Forbearance Order* does not, however, create a precedent that somehow requires the Commission to apply a granular market analysis when ruling on a nationwide forbearance petition. Likewise, the Commission held in the *Business Data Services Order* that it was not required to conduct a traditional market power analysis of each individual local market, and the Eighth Circuit upheld that determination.[93]

INCOMPAS and others argue that the national approach of the *2015 USTelecom Forbearance Order* does not apply to analyzing USTelecom's Petition because, there, the Commission was not addressing "core local competition provisions" of Section 251.[94] But they cite no applicable support for that distinction, which improperly conflates Sections 251 with Section 10. As the D.C. Circuit has recognized, however, Section 10 is a distinct provision, and parties "cannot rope section 251's requirements into the Commission's section 10 analysis."[95]

Additionally, a localized inquiry of competition would serve no utility here. In the business data services market, the Commission has already concluded that in the areas where 91% of business data services demand is concentrated and almost all UNEs are located, markets

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Puerto Rico Comments at 7 (asserting that the Commission must apply the *Qwest Phoenix* standard).

[92] *Qwest Phoenix Forbearance Order* ¶ 21.

[93] *Citizens Telecomms.*, 2018 WL 4083352, at *10 (holding that, despite the fact that the Commission had "applied [the traditional market power] framework in other orders in other contexts, it was [not] bound do so in the *Business Data Services Order*.").

[94] INCOMPAS Mot. for Summ. Denial at 14-16; Granite Comments at 12-13; TPx Comments at 14-15; First Communications Comments at 12.

[95] *U.S. Telecom Ass'n*, 825 F.3d at 729.

are competitive, even when UNEs are not factored in.[96] And in the other areas that contain the remaining 9% of business data services demand, and in the case of Verizon only about **[BEGIN HIGHLY CONFIDENTIAL] [END HIGHLY CONFIDENTIAL]** of UNE demand, UNEs are not being used for their intended purpose, and getting rid of UNEs won't harm consumers because those areas are subject to strict price caps that ensure that rates are just and reasonable and that consumers are adequately protected.[97] In the voice market, a localized inquiry into ILECs' market power is likewise unnecessary due to ubiquitous wireless, broadband, and other alternatives,[98] as well as bill-and-keep intercarrier compensation.[99] On that basis, the Commission has already concluded that ILECs throughout the nation do not have market power in the provision of interstate switched access, and competition has only continued to grow since.[100] Thus, nationwide forbearance is appropriate.

C. The CLECs' "Natural Forbearance" Argument Lacks Merit

INCOMPAS and other opponents argue that forbearance is inappropriate because ILECs' obligation to unbundle DS0 loops, and potentially DS1 and DS3 loops, will be eliminated when ILECs retire their copper lines.[101] According to these claims, ILECs have a "natural" road to forbearance by transitioning their networks from copper to fiber. These commenters further

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[96] *Business Data Services Order* ¶¶ 141, 179.

[97] *Id.* ¶ 184 (explaining that "[b]usiness data services remaining within price caps after this Order will consist largely of incumbent LECs' DS1 and DS3 end user channel terminations in non-competitive counties").

[98] *Technology Transitions Order* ¶ 16.

[99] *Id.* ¶¶ 8, 22.

[100] *Id.* ¶ 31.

[101] INCOMPAS et al. Comments at 9, 42-43; CALTEL Comments at 35-38; Raw Bandwidth Comments at 13; TPx Comments at 34-35; Wholesale Voice Line Coalition Comments at 4-6.

suggest that, because ILECs have not made that transition everywhere yet, it indicates that ILECs are not serious about deploying fiber, and seek forbearance so they may suppress competition rather than invest. These claims lack merit.

As an initial matter, Section 10 contains no requirement that ILECs complete the transition to fiber before being relieved of the obligation to unbundle and resell service on their copper networks. Section 10 mandates that the Commission "shall" forbear from enforcing provisions of the Act when certain criteria are satisfied, and as prior forbearance proceedings have demonstrated, those criteria may be satisfied with respect to copper facilities before those facilities are removed from the ground. Thus, the Commission has previously granted forbearance from the unbundling requirements in specific MSAs on the basis of competition, even though copper lines were still in place at that time, and there was no timeline for the replacement of those lines with fiber.[102]

The CLECs' policy arguments also are specious. As demonstrated above, the particular CLECs opposing the Petition are primarily using UNEs in areas that, as they concede, are the least likely as a matter of economics to attract new facilities. In these areas, it is appropriate to eliminate unbundling precisely because the unbundling regulations are not serving their intended purpose of spurring facilities-based competition. Instead they have become a permanent way to subsidize some companies' provision of services to those areas. Therefore, the argument that ILECs should not receive forbearance from UNEs in these areas unless they deploy fiber is just a

[102] *See*, *e.g.*, Memorandum Opinion and Order, *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area*, 22 FCC Rcd 1958, ¶¶ 1-2 (2007) (granting partial forbearance from unbundling obligations in wire centers in the Anchorage study area).

disguised argument that ILECs should be required to continue providing this subsidy indefinitely. This is not only contrary to the Act, but would, if anything, slow the deployment of fiber and other competitive facilities elsewhere in the country, by draining resources from the ILECs and distorting marketplace and investment decisions.

III. UNES ARE NOT NECESSARY TO ENSURE SERVICE IN UNDERSERVED URBAN COMMUNITIES

The members of the Wholesale Voice Line Coalition argue that ILECs must continue to subsidize the Coalition members' UNE-based business plans in order to ensure continuity of service to their "typically poor and low-income consumers in the urban markets." But these arguments are based on the false premise that "cable and telephone incumbents have ignored" those markets.[103] In particular, they claim that "Verizon, while touting the availability of FiOS, has not deployed FiOS" to "low income neighborhoods" or "New York City Housing Authority [NYCHA] buildings" in New York City.[104] In fact, Verizon has already extended its fiber-optic network to *all* neighborhoods in the City, and is extending its network into specific buildings in those neighborhoods not on the basis of income, but on the basis of demand[105] and the willingness of building owners and managers to provide Verizon with access to those buildings.[106]

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[103] Wholesale Voice Line Coalition Comments at 24.

[104] *Id.* "[NYCHA's] mission is to increase opportunities for low- and moderate-income New Yorkers by providing safe, affordable housing and facilitating access to social and community services." NYCHA, *About NYCHA*, https://www1.nyc.gov/site/nycha/about/about-nycha.page.

[105] Under Verizon's cable television franchise agreement with New York City, an obligation to extend the fiber network into a particular building must be triggered by a bona fide request for service from a resident of that building.

[106] The implication that Verizon has not fulfilled its obligation "to bring fiber to every customer in New York City by June 2014" (Wholesale Voice Line Coalition Comments at 24-25) confuses the company's obligation under its cable franchise agreement to extend its fiber network

Verizon has extended its fiber network into more than 75% of the approximately 181,000 NYCHA households across New York City, meaning residents of those households can get Fios services within seven business days. An additional 16,000 NYCHA households (roughly 8%) are in some stage of moving toward Fios construction and will have Fios services shortly. These statistics belie the Coalition's claims that Verizon is not making its Fios services available to low-income residents.

CONCLUSION

Forbearance from the unbundling obligations and resale mandate will save consumers money, spur investment into new technologies, and create jobs. The Commission should grant USTelecom's Petition.

throughout the City—a task that has already been accomplished—and its obligation to extend its network into particular buildings—an obligation that, as noted above, is generally driven by demand and access issues.

Respectfully submitted,

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September 5, 2018